Supreme Court, U.S.
FILED

No. 031687 MAY 28 2004

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2003

REGINALD WILEY

*Petitioner,*

*v.*

CITY OF CHICAGO, and
BRODERICK JONES,

*Respondent.*

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

# PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Should the Court resolve the conflict among the circuits in applying this Court's decision in *Albright v. Oliver,* 510 U.S. 266 (1994) to a police frame-up that results in a criminal prosecution which does not conclude with a conviction?

2. Is the Seventh Circuit's rule that damages in an action under 42 U.S.C. §1983 for a police frame-up end when formal charges are filed consistent with the rule of *Monroe v. Pape,* 365 U.S. 167, 187 (1961), is part of that Section 1983 incorporates the "background of tort liability that makes a man responsible for the natural consequences of his actions?"

3. When an appellant secures reversal of a district court's order dismissing a complaint, may a court of appeals deem "waived" a claim that was raised in the complaint but not challenged in the district court by the defendant nor raised in any way on appeal?

# INDEX

OPINIONS BELOW . . . . . 1
JURISDICTION . . . . . 1
STATUTE INVOLVED . . . . . 1
STATEMENT . . . . . 1
REASONS FOR GRANTING THE WRIT . . . . 3
CONCLUSION . . . . . 9

## TABLE OF AUTHORITIES

*Albright v. Oliver*, 510 U.S. 266 (1994) ..... 2, 3, 5

*Buckley v. Fitzsimmons*, 509 U.S. 259 (1993) ..... 6

*Carey v. Piphus*, 435 U.S. 247 (1978) ..... 6

*Castellano v. Fragozo*, 352 F.3d 939 (5th Cir. 2003) (en banc) ..... 4, 6

*Christman v. Hanrahan*, 500 F.2d 65 (7th Cir. 1974) ..... 3

*Galbraith v. County of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002) ..... 4, 5

*Gallo v. City of Philadelphia*, 161 F.3d 217 (3d Cir. 1998) ..... 4, 5

*Gauger v. Hendle*, 349 F.3d 354 (7th Cir. 2003) ..... 2, 4

*Gerstein v. Pugh*, 420 U.S. 103 (1975) ..... 7

*Heck v. Humphrey*, 512 U.S. 477 (1994) ..... 2

*Kalina v. Fletcher*, 522 U.S. 118 (1997) ..... 7

*Kingsland v. City of Miami*, ___ F.3d ___, 2004 WL 1050743 (11th Cir. 2004) ..... 4, 5

*Lambert v. Williams*, 223 F.3d 257 (4th Cir. 2000) ..... 4, 5

*Moran v. Clark*, 296 F.d 638 (8th Cir. 2002) (en banc) .. 4, 6

*Monroe v. Pape*, 365 U.S. 167 (1961) ..... 7

*Malley v. Briggs*, 475 U.S. 335 (1986) ..... 7

*Moran v. Clark*, 296 F.d 638 (8th Cir. 2002) (en banc) .. 4, 6

*Newsome v. McCabe*, 256 F.3d 747 (7th Cir. 2001), *opinion on denial of rehearing*, 260 F.3d 824 (7th Cir. 2001), *opinion following remand*, 319 F.3d 301 (7th Cir. 2003) ..... 3, 6

*Nieves v. McSweeney*, 241 F.3d 46 (1st Cir. 2001) ..... 4, 5

*Pierce v. Gilchrist*, 359 F.3d 1279 (10th Cir. 2004) ..... 4

*Stemley v. City of Florence*, 126 F.3d 856 (6th Cir. 1997), *opinion following remand*, 350 F.3d 578 (6th Cir. 2003) .. 4

*Wyatt v. Cole*, 504 U.S. 158 (1992) ..... 6

*Zahrey v. Coffey*, 221 F.3d 342 (2d Cir. 2000) ..... 4

# PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on March 22, 2002.

## OPINIONS BELOW

The decision of the Court of Appeals (App. 1-6) is reported at 361 F.3d 994. The opinions of the district court (App. 9-14, 15-17) are unreported.

## JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254: The judgment of the court of appeals was entered on March 22, 2004. (App. 7.) Rehearing was denied on April 16, 2004. (App. 8.)

## STATUTE INVOLVED

This case involves the Fourth Amendment to the Constitution of the United States and 42 U.S.C. §1983.

## STATEMENT

Petitioner Reginald Wiley filed an action for money damages under 42 U.S.C. §1983 against respondents, Chicago Police Officer Broderick Jones and the City of Chicago. (App. 18-19.) Petitioner alleged that he had been framed on January 9, 2000 for a narcotics offense by respondent Jones, (App. 18, par. 5), that Jones had thereafter concealed petitioner's innocence of any criminal wrongdoing from the prosecutors, and had thereby caused petitioner to have been "wrongfully prosecuted." (App. 18-19, par. 6.) The prosecution continued until July of 2002, when all charges were dismissed. (App. 19, par. 7.) Petitioner also alleged that the officer's misconduct was possible because of the deliberate indifference by the City of Chicago to the fabrication of evidence by its police officers. (App. 19, par. 8.) Petitioner sought damages for the violation of rights secured by the Fourth and Fourteenth Amendments, as well as damages for the Illinois tort of malicious prosecution. (App. 19, par. 9.)

Respondent City of Chicago moved to dismiss petitioner's complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure.[1] The City did not contest liability for its alleged deliberate indifference, (App. 10), but asserted that petitioner's only federal claim was for false arrest, and argued that this claim was barred by the two year statute of limitations because the claim had accrued when petitioner was arrested. Petitioner argued that respondent's accrual theory was contrary to *Heck v. Humphrey,* 512 U.S. 477 (1994), but the district court accepted respondent's argument, dismissed petitioner's federal claims against both defendants, and declined to exercise jurisdiction over petitioner's state law malicious prosecution claim. (App. 13-14.)

On appeal, the Seventh Circuit rejected the district court's interpretation of *Heck v. Humphrey, supra.* (App. 2-5.) The Court of Appeals held, however, that petitioner could not maintain a federal claim for "wrongful prosecution," (App. 5), and concluded that petitioner's federal claim was limited to one for false arrest. (App. 5.) The Seventh Circuit followed its decision in *Gauger v. Hendle,* 349 F.3d 354, 361 (7th Cir. 2003), to hold that the damages recoverable on a false arrest claim stop when the arrestee is arraigned or formally charged. (App. 6.) The Court of Appeals rejected petitioner's reliance on the "continuing seizure" theory discussed by Justice Ginsburg in her concurring opinion in *Albright v. Oliver,* 510 U.S. 266 (1994) (App. 5), and held that petitioner had waived his federal claim against the City of Chicago because he had "failed to advance it on appeal." (App. 6.) Petitioner pointed out in a timely petition for rehearing that waiver was inappropriate because the district

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1. Respondent Jones filed an answer to the complaint, denying any wrongdoing.

court expressly noted that "[t]he City does not contest plaintiff's 'policy' allegations." (App. 10.) Rehearing was denied without opinion. (App. 8.)

## REASONS FOR GRANTING THE WRIT

### -I-

This case provides the Court with an opportunity to resolve the conflict among the circuits in applying this Court's decision in *Albright v. Oliver,* 510 U.S. 266 (1994) to a police frame-up that results in a criminal prosecution which does not conclude with a conviction.

In its decision in this case, the Seventh Circuit applied its rule that, unless there is a conviction that is subsequently overturned, the federal remedy available to the victim of a police frame-up is limited to the damages that were incurred from the time of arrest to the time of formal charge. (App. 6.)

The Seventh Circuit's rationale for this rule is two-fold. First, a police frame-up does not implicate any due process interest unless the frame-up results in a conviction.[2] Second,

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2. When a frame-up results in a conviction that is subsequently overturned, the Seventh Circuit permits the recovery of full compensatory damages in a Section 1983 action "for denial of a fair trial" under the Due Process Clause of the Fourteenth Amendment. *Newsome v. McCabe,* 256 F.3d 747, 751 (7th Cir. 2001), *opinion on denial of rehearing,* 260 F.3d 824 (7th Cir. 2001), *opinion following remand,* 319 F.3d 301 (7th Cir. 2003). In the view of the Seventh Cicuit, there cannot be any denial of a fair trial until there is a conviction. *Christman v. Hanrahan,* 500 F.2d 65 (7th Cir. 1974).

while a police frame-up is actionable as a Fourth Amendment violation, damages end when formal charges are filed because "the Fourth Amendment is aimed at deterring unreasonable searches and seizures, not malicious prosecutions." *Gauger v. Hendle,* 349 F.3d 354, 363 (7th Cir. 2003).

The circuits are split on whether a police frame-up should be viewed as an unlawful seizure under the Fourth Amendment or as a Fourteenth Amendment due process violation.[3] The Seventh Circuit stands alone in its limitation on the

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3. The First, Third, Fourth, Ninth, and Eleventh Circuits view a police frame-up as a Fourth Amendment violation. *Nieves v. McSweeney,* 241 F.3d 46, 54 (1st Cir. 2001); *Gallo v. City of Philadelphia,* 161 F.3d 217, 222 (3d Cir. 1998); *Lambert v. Williams,* 223 F.3d 257 (4th Cir. 2000); *Galbraith v. County of Santa Clara,* 307 F.3d 1119, 1127 (9th Cir. 2002); *Kingsland v. City of Miami,* ___ F.3d ___, 2004 WL 1050743, *10 (11th Cir. 2004).

   The Second, Fifth, Sixth, and Eighth Circuit view a police frame-up as a denial of due process. *Zahrey v. Coffey,* 221 F.3d 342 (2d Cir. 2000) *Castellano v. Fragozo,* 352 F.3d 939, 958 (5th Cir. 2003) (en banc); *Stemley v. City of Florence,* 126 F.3d 856, 872 (6th Cir. 1997), *opinion following remand,* 350 F.3d 578 (6th Cir. 2003) (fabrication of evidence, acquittal, due process theory); *Moran v. Clark,* 296 F.d 638, 647 (8th Cir. 2002) (en banc)

   The Tenth Circuit has not chosen between the two theories, concluding in *Pierce v. Gilchrist,* 359 F.3d 1279, 1293 (10th Cir. 2004) that fabricating evidence is actionable either as a "due process/fair trial deprivation" or as Fourth Amendment violation.

damages recoverable in a Section 1983 action for a police frame-up.

**-A-**

The conflict among the circuits reflects various interpretations of the concurring and dissenting opinions in *Albright v. Oliver,* 510 U.S. 266, 279 (1994). There, the petitioner had been charged with a non-existent offense and brought a Section 1983 action against the police officer who had initiated the criminal proceedings. The petitioner did not raise any Fourth Amendment claim, but asserted only "that the action of respondents infringed his due process right to be free of prosecution without probable cause. He does not claim that Illinois denied him the procedural due process guaranteed by the Fourteenth Amendment." 510 U.S. at 812.

*Albright* was decided without a majority opinion. In her concurring opinion, Justice Ginsburg endorsed the view that being held to answer criminal charges, being required to appear in court, and being subject to travel restrictions amounts to a seizure under the Fourth Amendment. This "continuing seizure" theory has been adopted without reservation by the Fourth and Ninth Circuits,[4] and is used by the First, Third, and Eleventh Circuits as the framework for deciding whether conditions of pre-trial release constitute a seizure.[5] The "continuing seizure" theory has been

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4. *Lambert v. Williams,* 223 F.3d 257 (4th Cir. 2000); *Galbraith v. County of Santa Clara,* 307 F.3d 1119, 1127 (9th Cir. 2002).

5. *Nieves v. McSweeney,* 241 F.3d 46, 54 (1st Cir. 2001); *Gallo v. City of Philadelphia,* 161 F.3d 217, 222 (3d Cir. 1998); *Kingsland v. City of Miami,* ___ F.3d ___, 2004 WL 1050743, *10 (11th Cir. 2004).

"repeatedly rejected" by the Seventh Circuit (App. 5), and has likewise been rejected by the Fifth and Eighth Circuits.[6]

In the view of the Seventh Circuit, the concurring opinion of Justices Kennedy and Thomas in *Albright* "constitutes the effective holding of the Court." *Newsome v. McCabe,* 256 F.3d 747, 751 (7th Cir. 2001), *opinion on denial of rehearing,* 260 F.3d 824 (7th Cir. 2001). The Seventh Circuit stands alone in this interpretation of *Albright.* See *Castellano v. Fragozo,* 352 F.3d 939, 958 (5th Cir. 2003) (en banc).

**-B-**

"[T]he basic purpose of a 1983 damages award should be to compensate persons for injuries caused by the deprivation of constitutional rights." *Carey v. Piphus,* 435 U.S. 247, 254 (1978). The Seventh Circuit's rule limiting the damages recoverable for a police frame-up is contrary to the purpose of Section 1983 to "deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails." *Wyatt v. Cole,* 504 U.S. 158, 161 (1992).

A police frame-up has impact beyond the immediate deprivation of liberty associated with an unlawful arrest. First, an arrest often results in "stigma and trauma." *Buckley v. Fitzsimmons,* 509 U.S. 259, 287 (1993). Neither the stigma nor the trauma ends when formal charges are filed.

Second, a police frame-up infects all post-arrest judicial proceedings. After a police officer has made a warrantless

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6. *Castellano v. Fragozo,* 352 F.3d 939, 958 (5th Cir. 2003) (en banc). *Moran v. Clark,* 296 F.d 638, 647 (8th Cir. 2002) (en banc)

arrest, the judicial determination of probable cause that must follow a warrantless arrest, *Gerstein v. Pugh,* 420 U.S. 103, 114 (1975), is corrupted by the officer's wrongdoing when the judge makes a determination of probable cause by accepting as true false statements made by the arresting officer.

A police frame-up similarly corrupts the prosecutor's decision to file formal charges and the judge's decision to set bond and to determine conditions of pre-trial release. The effects of a police frame-up continue until the time that case is resolved in favor of the arrestee.

The Seventh Circuit's limitation on the damages that are recoverable because of a police frame-up flies in the face of the "background of tort liability that makes a man responsible for the natural consequences of his actions" *Monroe v. Pape,* 365 U.S. 167, 187 (1961). The filing of criminal charges based on a police frame-up does not break the causal chain. *Malley v. Briggs,* 475 U.S. 335 (1986); *Kalina v. Fletcher,* 522 U.S. 118 (1997).

A victim of a police frame-up should have access to the same federal remedy regardless of the circuit in which the case arises. In accordance with the principles that this Court has consistently applied since *Monroe v. Pape,* 365 U.S. 167, 187 (1961), the damages recoverable for a police frame-up should not arbitrarily end when formal charges are filed, but should include all damages that are the "natural consequence" of the frame-up.

**-II-**

The Seventh Circuit fashioned out of whole cloth a new rule of appellate procedure when it held that plaintiff had "waived" his claim of municipal liability. (App. 6.)

Petitioner alleged in his complaint that the frame-up was caused by the deliberate indifference of the City of Chicago to the fabrication of evidence by its police officers. Respondent City conceded the sufficiency of petitioner's claim —

the opinion of the district court makes plain that "[t]he City does not contest plaintiff's 'policy' allegations, but says that he has not adequately alleged that he was deprived of a constitutional right." (App. 10.) The City did not change its position on appeal and limited its arguments to supporting the district court's order that plaintiff's frame-up claim was barred by the statute of limitations. Nonetheless, the Seventh Circuit held that petitioner had waived his federal claim against the City of Chicago because he had "failed to advance it on appeal." (App. 6.) This waiver rule is a vast departure from accepted and ordinary appellate procedure and should be corrected by this Court.

## CONCLUSION

It is therefore respectfully submitted that the petition for writ of certiorari should be granted.

May, 2004

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# APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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No. 03-1490

REGINALD WILEY

*Plaintiff-Appellant,*

*v.*

CITY OF CHICAGO, and
BRODERICK JONES,

*Defendants-Appellees.*

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Appeal from the United States District Court
for the Northern District of Illinois
No. 02 CV 6076 —**Paul E. Plunkett** *Judge.*

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Argued November 12, 2003—Decided March 22, 2004

Before BAUER, MANION, and ROVNER, Circuit Judges.

MANION, Circuit Judge. Reginald Wiley alleges that for several years Chicago police officer Broderick Jones has been framing innocent citizens and arresting them without cause. According to Wiley, Jones's routine in each case is the same: he and his partner approach a suspected drug dealer; if a search fails to reveal any incriminating evidence, they plant drugs on him and profess that he was engaged in illegal activity. Wiley claims that in January 2000 he was the victim of one of Jones's frame-ups. He was arrested and prosecuted for possession of narcotics, though the charge was eventually dismissed in July 2002. One month later Wiley sued Jones and the City of Chicago under 42 U.S.C. §1983

for "wrongful prosecution," alleging that Jones fabricated evidence in order to arrest him and thereafter misrepresented his guilt to prosecutors. Wiley further alleged that Jones was able to accomplish his misdeeds by virtue of the City's deliberate indifference to its officers' conduct.

The district court dismissed Wiley's suit for failure to state a claim. Fed. R. Civ. P. 12(b)(6). The court understood Wiley to be asserting that he was prosecuted without probable cause, a cause of action under ' 1983 that we rejected in *Newsome v. McCabe,* 256 F.3d 747, 750-51 (7th Cir. 2001). The court allowed that even if Wiley did not have a claim in federal court for wrongful or malicious prosecution, the alleged conduct might still be actionable if it violated a substantive constitutional right, like the due process right to a fair trial. But despite Wiley's contention that his fair trial rights had been violated, the court concluded that Wiley did not have any such claim. Wiley moved to amend the judgment, Fed. R. Civ. P. 59(e), arguing that the court had overlooked his Fourth Amendment claim against Jones. The district court construed Wiley's Fourth Amendment claim as one for false arrest and denied the motion. Citing *Snodderly v. R.U.F.F. Drug Enforcement Task Force,* 239 F.3d 892 (7th Cir. 2001), the court held that any Fourth Amendment cause of action against Jones began to accrue at the time of arrest and so Wiley's claim—filed more than two years after his arrest—was untimely, *Gonzales v. Entress,* 133 F.3d 551, 554 (7th Cir. 1998) (statute of limitations on civil rights action is two years in Illinois).

On appeal both parties agree that if Jones arrested Wiley on the basis of planted "evidence," Wiley would have a Fourth Amendment claim for false arrest. What the parties dispute is when Wiley's claim began to accrue. Wiley argues that the two-year statute of limitations did not begin to run until the charges against him were dismissed; the defendants maintain that his claim began to accrue at the time of the arrest and must now be barred as untimely.

We begin with first principles and therefore start our discussion with *Heck v. Humphrey,* 512 U.S. 477 (1994). *Heck* bars any suit for damages premised on a violation of civil rights if the basis for the suit is inconsistent with or would undermine the constitutionality of a conviction or sentence. Id. at 486-87. Should success in a civil suit necessarily imply the invalidity of a conviction or sentence, Heck requires the potential plaintiff to wait until his conviction is nullified before bringing suit. Id. This rule applies not only to convicted persons but also to plaintiffs like Wiley who as yet only face prosecution. *Gonzales,* 133 F.3d at 553. "If success on the [defendant's] claims would have necessarily implied the invalidity of a potential conviction on the . . . charge, then [defendant's] claims did not accrue until the day on which the . . . charge was dismissed." *Washington v. Summerville,* 127 F.3d 552, 556 (7th Cir. 1997). So if a prisoner or an individual facing prosecution seeks damages using §1983 for an alleged violation of his civil rights, a district court must first determine whether "a judgment in favor of the plaintiff would necessarily imply the invalidity" of the plaintiff's actual or potential conviction. *Heck,* 512 U.S. at 487. If it would, then the suit is barred and the complaint must be dismissed. Id.

Following *Heck,* this court has often held that civil rights claims of false or wrongful arrest arising out of the Fourth Amendment begin to accrue at the time of arrest regardless of subsequent proceedings. *See, e.g., Copus v. City of Edgerton,* 151 F.3d 646, 648-49 (7th Cir. 1998); *Booker v. Ward,* 94 F.3d 1052, 1056 (7th Cir. 1996); *Simpson v. Rowan,* 73 F.3d 134, 136 (7th Cir. 1995). The rationale behind this approach is that a wrongful arrest claim does not necessarily undermine a conviction; "one can have a successful wrongful arrest claim and still have a perfectly valid conviction." *Booker,* 94 F.3d at 1056; *see also Gonzales,* 133 F.3d at 553; *Washington,* 127 F.3d at 556. Therefore, generally speaking, claims for wrongful arrest may be brought immediately

because "the injury of being detained illegally is compensable regardless of whether the plaintiff is later convicted or even prosecuted." *Snodderly*, 239 F.3d at 897.

But this general approach must not be understood as a rule to be applied in every case. The defendants urge us to view our cases such as Booker, Washington, and Gonzales as creating an invariable rule that false arrest claims under the Fourth Amendment accrue at the time of arrest. Such may be the case most of the time, but not always. For while we recognize that discussion in our earlier decisions may have implied such a rule, see *Gauger v. Hendle*, 349 F.3d 354, 361 (7th Cir. 2003), the accrual of the civil rights claims brought in this and other cases is ultimately governed by the Supreme Court's decision in *Heck*. And as we recently explained in *Gauger*, because "sometimes a successful challenge to a false arrest can indeed impugn the validity of the plaintiff's conviction," *Heck* may in fact occasionally bar a civil rights claim premised on a false or wrongful arrest. Id. As a result, plaintiffs complaining of false arrest will sometimes have to wait until their criminal charge or conviction is set aside or dismissed before they can bring suit. *See id.*

This may be one of those times. If, as alleged, Wiley was arrested and prosecuted solely on the basis of drugs planted by the arresting officers, then any attack on the arrest would necessarily challenge the legality of a prosecution premised on the planted drugs. *See id.* at 362. Therefore, any civil suit against Officer Jones for a false arrest would necessarily imply the invalidity of a potential conviction, and Heck requires that Wiley's Fourth Amendment claim would not begin to accrue until the charges were dismissed. *See Heck*, 512 U.S. at 489-90; *Washington*, 127 F.3d at 556. Of course had Wiley been prosecuted on evidence (other than the planted drugs) that would not be invalidated if he successfully challenged his arrest, then Wiley's false arrest claim would not be barred by Heck and would be untimely. *See Gonzales*, 133 F.3d at 553-54. Because at this stage in the

proceedings we accept Wiley's allegations as true, see *McCullah v. Gadert*, 344 F.3d 655, 657 (7th Cir. 2003), we remand this case with instructions to reinstate Wiley's Fourth Amendment claim against Jones for false arrest.

The conclusion we reach here is supported by our recent decision in Gauger. Gary Gauger had been convicted of murder based on statements he made to detectives during an 18-hour interrogation. *Gauger*, 349 F.3d at 356-57. His conviction was overturned on grounds that his statements were inadmissable because the officers lacked probable cause to arrest him in the first place. Id. at 357. Although more than two years had passed from the time of his unlawful arrest until the filing of his §1983 complaint, we deemed Gauger's claim timely. Id. at 362. For Gauger to attack his arrest, we reasoned, "was implicitly to challenge the legality of his conviction, which rested crucially on the statements that he made to the police when he was questioned after being arrested." Id. at 361. Therefore, because Heck barred him from challenging his arrest until he had his conviction overturned, his false arrest claim did not begin to accrue until he had done so. Id. at 361-62. Similarly here, if Wiley's attack on his arrest would challenge the only evidence supporting a potential conviction, then his claim did not begin to accrue until the charges were dismissed in July 2002. *See id.*

For guidance on remand, we also consider the scope of Wiley's claim. Wiley contends that his Fourth Amendment claim encompasses not only the false arrest but also his subsequent "wrongful prosecution," which Jones allegedly initiated and extended by lying to prosecutors. Wiley argues that we should consider him to have been wrongfully detained under the "continuing seizure" approach set forth by Justice Ginsburg, who suggested that a defendant ought to be considered "seized" under the Fourth Amendment "so long as he is bound to appear in court and answer the state's charges." *Albright v. Oliver*, 510 U.S. 266, 279 (1994) (Ginsburg, J., concurring).

But we have repeatedly rejected the "continuing seizure" approach. *McCullah,* 344 F.3d at 661; *Lee v. City of Chicago,* 330 F.3d 456, 463 (7th Cir. 2003); *Reed v. City of Chicago,* 77 F.3d 1049, 1052 n.3 (7th Cir. 1996); *Wilkins v. May,* 872 F.2d 190, 194 (7th Cir. 1989). Instead, we have held that the scope of a Fourth Amendment claim is limited up until the point of arraignment; "the interest in not being prosecuted groundlessly is not an interest that the Fourth Amendment protects." *Gauger,* 349 F.3d at 362-63. Once arraigned, the prosecution is underway. If that prosecution is at some point deemed malicious, then it "is not a constitutional tort unless the state provides no remedy for malicious prosecution." *Id.* at 359. But at oral argument Wiley's counsel insisted that his case was not one for malicious prosecution.

One final matter remains. Although Wiley alleged in his complaint that the City of Chicago was deliberately indifferent to the misconduct of its police officers, he has waived this claim by failing to advance it on appeal. *See Duncan v. Wis. Dep't of Health & Family Serv.,* 166 F.3d 930, 934 (7th Cir. 1999).

We therefore remand this case to the district court with instructions to reinstate Wiley's Fourth Amendment false arrest claim against Officer Jones. The scope of this claim, should Wiley prevail on its merits, is limited to the time from his arrest until he was charged.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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No. 03-1490

REGINALD WILEY

*Plaintiff-Appellant,*

*v.*

CITY OF CHICAGO, and
BRODERICK JONES,

*Defendants-Appellees.*

---

Appeal from the United States District Court
for the Northern District of Illinois
No. 02 CV 6076 —**Paul E. Plunkett** *Judge.*

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[March 22, 2004]

**JUDGMENT — ORAL ARGUMENT**

Honorable William J. Bauer, Circuit Judge
Honorable Daniel A. Manion, Circuit Judge
Honorable Ilana D. Rovner, Circuit Judge

The judgment of the District Court is AFFIRMED in part, REVERSED in part and REMANDED. The above is in accordance with the decision of this court entered on this date. Each party to bear its own costs.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

---

No. 03-1490

REGINALD WILEY

*Plaintiff-Appellant,*

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---

Appeal from the United States District Court
for the Northern District of Illinois
No. 02 CV 6076 —**Paul E. Plunkett** *Judge.*

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[April 16, 2004]

**ORDER**

Honorable William J. Bauer, Circuit Judge
Honorable Daniel A. Manion, Circuit Judge
Honorable Ilana D. Rovner, Circuit Judge

On consideration of the Petition for Rehearing En Banc filed by plaintiff-appellant, in the above-captioned case by plaintiff-appellant, no judge in active service has requested a vote on the Petition for Rehearing En Banc, and all of the judges on the original panel have voted to deny rehearing. The petition is therefore DENIED.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 02 CV 6076

REGINALD 1ILEY

*Plaintiff,*

CITY OF CHICAGO and
CHICAGO POLICE OFFICER
BRODERICK JONES

*Defendants.*

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## MEMORANDUM OPINION AND ORDER

PLUNKETT, United States District Judge.

Reginald Wiley has sued the City of Chicago and Broderick Jones under both state and federal law for having wrongfully prosecuted him. The City of Chicago has filed a Federal Rule of Civil Procedure ("Rule") 12(b)(6) motion to dismiss the 42 U. S.C. ' ("section") 1983 claim asserted against it. For the reasons set forth below, the motion is granted.

### I. Facts

On January 9, 2000, defendant Jones, who is a Chicago police officer, arrested plaintiff and caused him to be charged with a crime. (Compl. par. 5.) Jones fabricated the evidence on which the arrest was based, but concealed that fact from the prosecutors. (Id. pars. 5-6.) On July 8, 2002, all charges against plaintiff were dismissed. (Id. 17.)

Jones was able to engage in this wrongful conduct because of the City's deliberate indifference to the fabrication of evidence by its police officers. (Id. par. 8.) Plaintiff says that the City's conduct violated his Fourteenth Amendment due process rights and seeks damages in excess of

$100,000.00.

## II. The Legal Standard

On a Rule 12(b)(6) motion to dismiss, the Court accepts as true all well-pleaded factual allegations of the complaint, drawing all reasonable inferences in plaintiff's favor. Forseth v. Village of Sussex, 199 F.3d 363, 368 (7th Cir. 2000). No claim will be dismissed unless "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v.King & Spalding*, 467 U.S. 69, 73 (1984).

## III. Discussion

### Federal Claims

Section 1983 provides redress for constitutional deprivations that occur at the hands of certain government actors. 42 U.S.C. §1983. To state a viable section 1983 claim against the City, plaintiff must allege that he was deprived of a constitutional right pursuant to one of the City's customs or policies. *Id.*; *Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978).

The City does not contest plaintiff's "policy" allegations, but says that he has not adequately alleged that he was deprived of a constitutional right. At base, the City says, plaintiff alleges that he was prosecuted without probable cause, conduct that the Seventh Circuit has said is not actionable under section 1983. *See Newsome v. McCabe*, 256 F.3d 747, 750-51 (7th Cir. 2001) (stating that the "effective holding" of Albright v. Oliver, 510 U.S. 266 (1994) is that prosecution without probable cause violates due process if it deprives the plaintiff of "an adequate opportunity to defend himself in [a] criminal prosecution," but is actionable under section 1983 only if state post-deprivation remedies are inadequate); *see also Penn v. Harris*, 296 F.3d 573, 576 (7th Cir. 2002) (quoting *Newsome* for the proposition that "there is no constitutional right not to be prosecuted without probable cause.") (internal quotation marks and citation omitted).

Though malicious prosecution itself is not actionable under section 1983, the conduct underlying that label — suppression of exculpatory evidence, subornation of perjury and the like — is actionable if it violates a substantive constitutional right, like the due process right to a fair trial. *Penn*, 296 F.3d at 576; *Newsome*, 256 F.3d at 752. Plaintiff contends that his allegations state a claim for violation of his fair trial rights, even though he was never actually tried.

The Court disagrees. Nearly thirty years ago, the Seventh Circuit said that the due process clause does not "provide broad generalized protection against misdeeds by police or prosecution." *Christman v. Hanrahan*, 500 F.2d 65, 67 (7thh Cir. 1974). Rather, the court said, "the mission of the clause [is] avoidance of an unfair trial to the accused, and no violation ... result[s] unless the misconduct [has] some prejudicial impact on the defense." Id. Thus, the court held that the due process clause was not violated by the prosecution's unsuccessful attempt to conceal exculpatory evidence because the delay in disclosure, though reprehensible, "did not prejudice the defense." Id. at 68.

Our court of appeals reaffirmed this view of due process in *Hensley v. Carey*, 818 F.2d 646 (7thh Cir. 1987). The plaintiff in that case had been arrested on a variety of criminal charges, largely on the strength of the victim's line-up identification. The charges were later dropped when the victim recanted the identification. Plaintiff filed a section 1983 action against the police officers who ran the line-up, claiming that it was unduly suggestive and, as a result, violated his due process rights.

The Seventh Circuit rejected plaintiff's argument that an improper line-up, by itself, violates due process:

> [The Supreme Court cases] establish a rule which bars the admission of unreliable evidence at trial. The rule against admission of evidence from unnecessarily suggestive lineups is a prophylactic rule designed to protect

> a core right, that is the right to a fair trial, and it is only the violation of the core right and not the prophylactic rule that should be actionable under §1983.

Id. at 649. Even if the line-up were suggestive, the court said, the identification evidence did not deprive him of his right to a fair trial because he was never tried. *Id.* at 649. Thus, the court concluded, plaintiff did not have a viable section 1983 claim. Id.

Plaintiff does not allege that he was tried for the charges on which he was arrested. In fact, in his response to the City's motion, he admits that the "charges were dismissed before trial." (Pl.'s Mem. Opp'n Mot. Dismiss at 3.) That admission dooms his section 1983 fair trial due process claims against both the City and, though he did not file a motion to dismiss, defendant Jones.

The Seventh Circuit's opinion in *Whitley v. Siebel,* 613 F.2d 682 (7th Cir. 1980) does not dictate a different result. *Whitley* is a section 1983 false arrest case that was analyzed under the rubric of due process. *Id.* at 684. In the *Whitley* court's view, a police officer who procured arrest authority through deliberate misrepresentations violated the plaintiff's right not to be seized without due process of law. *Id.* at 686. The case says nothing, however, about whether such conduct violated his due process right to a fair trial.

Plaintiffs reliance on *Jones v. City of Chicago,* 856 F.2d 985 (7thh Cir. 1988) is similarly misplaced. In that case, a young man who had been wrongfully arrested and jailed, but was never tried, sued the City and various police officers under section 1983 for false arrest, false imprisonment and malicious prosecution. In the course of its opinion, the court said:

> [A]t some point after a person is arrested, the question whether his continued confinement or prosecution is unconstitutional passes over from the Fourth

> Amendment to the due process clause.... But the causal inquiry is unchanged. If police officers have been instrumental in the plaintiff's continued confinement or prosecution, they cannot escape liability by pointing to the decisions of prosecutors . . . to confine or prosecute him.

*Id.* at 994. That statement suggests that police misconduct that occurs after an arrest and results in continued wrongful confinement, i.e., malicious prosecution, can form the basis of a section 1983 due process claim, even if the victim's fair trial rights are not impaired.

But that reading of *Jones* cannot survive *Newsome,* which holds that malicious prosecution, to the extent it violates due process at all, is not actionable under section 1983. *Newsome,* 256 F.3d at 750-52. After *Newsome,* a person who is wrongfully arrested can file a section 1983 Fourth Amendment claim contesting his arrest and the resulting confinement, and one whose fair trial rights are violated by police misconduct after the arrest can file a section 1983 Fourteenth Amendment claim. *Id.* at 751-52. But someone who is unlawfully arrested, does not file a timely Fourth Amendment claim and is never tried, cannot contest his pre-trial detention on the theory that the police officers' failure to tell the prosecutor about their misconduct deprived him of liberty without due process of law. *Id.* at 750-51. That is precisely what plaintiff is attempting to do here, an effort that cannot succeed in this circuit. Plaintiff's section 1983 due process claims, therefore, must be dismissed.

**State Claims**

Having dismissed the only federal claims in this lawsuit, the Court declines to exercise its supplemental jurisdiction over plaintiff's state-law claims. See 28 U.S.C. §1367(c)(3) (stating that court may decline to exercise supplemental jurisdiction over state claims if it has "dismissed all claims over which it [had] original jurisdiction").

## VI. Conclusion

For the reasons set forth above, the City's Rule 12(b)(6) motion to dismiss is granted and the section 1983 fair trial due process claims plaintiff asserts against both defendants are dismissed with prejudice. The Court declines to exercise its supplemental jurisdiction over plaintiffs' state-law claims, which are dismissed without prejudice to refiling in state court. This is a final and appealable order.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 02 CV 6076

REGINALD 1ILEY

*Plaintiff,*

CITY OF CHICAGO and
CHICAGO POLICE OFFICER
BRODERICK JONES

*Defendants.*

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**ORDER ON MOTION TO RECONSIDER**

PLUNKETT, United States District Judge.

On January 27, 2003, the Court entered judgment in favor of defendants on plaintiff's complaint. Plaintiff has filed a timely Federal Rule of Civil Procedure 59(e) motion to alter or amend seeking reinstatement of the section 1983 false arrest claim he asserted against defendant Jones.

Plaintiff alleges that Jones arrested him on January 9, 2000. (Compl. par. 5.) But he did not file his complaint until August 26, 2002, well after the two-year limitations period applicable to his false arrest claim had expired. *Kalimari v. Illinois Dept of Corr.*, 879 F.2d 276, 277 (7th Cir. 1989) (stating that statute of limitations for section 1983 actions filed in Illinois is two years).

Plaintiff acknowledges that he was arrested more than two years before he filed suit, but contends that his claim is still timely. Because the premise of his false arrest claim is that Jones fabricated evidence against him, plaintiff says that success on that claim would necessarily have undermined the criminal case against him. As such, he says, *Heck v.*

*Humphrey,* 512 U.S. 477 (1994) precluded him from filing suit until the criminal case was resolved in his favor. The criminal charges against him were dismissed on July 8, 2002 (See Compl. par. 7), about a month before he filed his complaint. Thus, plaintiff says, his false arrest claim is timely.

Plaintiff's argument was squarely rejected by the Seventh Circuit in *Snodderly v. R.U.F.F. Drug Enforcement Task Force,* 239 F.3d 892 (7th Cir. 2001). Snodderly, like the plaintiff in this case, filed a false arrest claim more than two years after he was arrested, but within two years after the criminal charges against him were dismissed. The district court dismissed the claim as untimely and Snodderly appealed. On appeal, Snodderly argued that *Heck* precluded him from bringing his false arrest claim until the charges against him were dropped because success on that claim would necessarily have impugned the pending prosecution.

The Seventh Circuit disagreed:

> [A] claim for false arrest, insofar as it seeks damages for the arrest only, would not necessarily imply the invalidity of any future conviction or sentence. A plaintiff could succeed on a false arrest claim by demonstrating that he was arrested without probable cause (for example, by showing that the arresting officers ignored exculpatory information and arrested him with little or no basis for suspecting that he committed the crime); however, this would not demonstrate the invalidity of a future conviction for the same offense. A person can be validly convicted regardless of the quantum of evidence possessed by the police at the time of arrest.

Id. at 899. On the strength of that distinction, the court rejected the notion that the accrual date for a section 1983 false arrest claim depends on the facts of each case and the parameters of *Heck.* Instead, the court reaffirmed its position that a claim for false arrest accrues at the time of the arrest. Id.

The court's opinion in *Okoro v. Bohman,* 164 F.3d 1059 (7th Cir. 1999) does not dictate a different result. First, *Okoro,* was not a section 1983 false arrest case, but a case pursuant to federal Rule of Criminal Procedure 41(c) seeking the return of property allegedly stolen during a. search. Id. at 1061. Moreover, even if it were a false arrest case, the court's statement about the application of *Heck* would be dictum because, as the court said, the issue was not even raised by the parties. Id. Finally, *Okoro* was decided two years before the court reaffirmed its "categorical approach" to applying Heck to false arrest cases in *Snodderly.* Thus, *Okoro* would not control this suit even if it were a false arrest case decided on the basis of Heck.

For all of these reasons, plaintiff's motion to alter or amend the Court's January 27, 2003 judgment order is denied.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
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No. 02 CV 6076

REGINALD 1ILEY

*Plaintiff,*

CITY OF CHICAGO and
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BRODERICK JONES

*Defendants.*

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## COMPLAINT

Plaintiff, by counsel, allege as follows:

1. This is a civil action arising under 42 U.S.C. §1983. The jurisdiction of this court is conferred by 28 U.S.C. §1343.

2. Plaintiff Reginald Wiley is a resident of the Northern District of Illinois.

3. Defendant CITY OF CHICAGO is an Illinois municipal corporation.

4. Defendant BRODERICK JONES, #17432 was at all times relevant acting under color of his authority as a Chicago police officers.

5. On January 9, 2000, defendant JONES arrested plaintiff and caused plaintiff to be charged with a criminal offense. Defendant JONES fabricated the evidence on which he made this arrest and did not have a lawful basis on which to make this arrest.

6. Thereafter, defendant JONES concealed defendant's innocence of any criminal wrongdoing from the

prosecutors and thereby caused plaintiff to be wrongfully prosecuted.

7. All charges against plaintiff were dismissed on July 8, 2002.

8. Defendant JONES committed the misconduct referred to above as the result of the deliberate indifference of defendant City of Chicago to the fabrication of evidence by its police officers.

9. As the direct and proximate result of the above described acts, plaintiff was deprived of rights secured by the Fourth and Fourteenth Amendment to the Constitution of the United States and subjected to the Illinois tort of malicious prosecution.

10. Plaintiff hereby demands trial by jury.

Wherefore plaintiff requests that judgment be entered in his favor and against defendants in an amount in excess of one hundred thousand dollars as compensatory damages and against defendants JONES in the amount of one hundred thousand dollars as punitive damages.

/s/ Kenneth N. Flaxman

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